RHB Bank Berhad v Sia Swee Hoe

HIGH COURT (MUAR) — ORIGINATING SUMMONS NO 24(HT)–599 OF 2005
LAU BEE LAN J
24 MAY 2007

Land Law — Sale of land — Order for — Application for order — 'Cause to the contrary' — Whether there exists cause to the contrary — Variation of interest rate — National Land Code 1965 ss 256 & 257

The defendant is the registered owner of property situated in Muar. The defendant obtained a housing loan facility from the plaintiff. The defendant defaulted in the loan repayment upon which the plaintiff recalled the said loan facility and commenced proceedings to obtain an order for sale of the said property. The defendant opposed the plaintiff's application primarily on the ground that the plaintiff failed to notify the defendant of the variation of the base lending rate from 6.00% to 6.5%. The defendant contended that this amounted to a cause to the contrary.

Held, granting order for sale:

(1) By virtue of the provisions of the facility agreement, the fact that no notice of variation of the base lending rate was extended to the defendant is immaterial as a failure to give notice shall not absolve the defendant from its obligation to pay interest at the prescribed rate determined by the Bank (see para 7).

(2) Even if it could be argued that there had been a failure to give notice of variation of the interest rate, at the most it may only form the basis of an action in personam against the plaintiff, which cannot defeat the rights ad rem which accrued to the plaintiff under the registered charge to an order for sale (see para 15).

[Bahasa Malaysia summary

Defendan merupakan seorang pemilik tunggal untuk harta tanah yang terletak di Muar. Defendan telah mendapatkan kemudahan pinjaman perumahan daripada plaintif. Defendan telah mungkir dalam pembayaran balik pinjamannya dan plaintif telah menarik balik kemudahan pinjaman tersebut dan memulakan prosiding bagi mendapatkan perintah penjualan hartanah tersebut. Defendan menentang permohonan plaintif atas alasan bahawa plaintif telah gagal untuk memaklumkan defendan berkenaan variasi kadar pinjaman asas daripada 6.00% kepada 6.5%. Defendan menegaskan ia telah meyebabkan jumlahnya menjadi sebaliknya

Diputuskan, memberikan perintah untuk penjualan:

(1) Berdasarkan peruntukkan perjanjian kemudahan, fakta bahawa tiada notis variasi kadar pinjaman asas telah dihantar kepada defendan adalah tidak material kerana kegagalan memberikan notis tidak akan melepaskan defendan daripada kewajipan untuk membayar faedah pada kadar yang ditentukan oleh Bank.

(2) Walaupun jika ia boleh dipertikaikan bahawa terdapat kegagalan untuk memberikan notis variasi kadar faedah, pada peringkat tertinggi ia akan hanya membentuk asas kepada tindakan in personam terhadap plaintif, yang tidak dapat mengalahkan hak-hak ad remnya yang telah terakru kepada plaintif di bawah gadaian berdaftar untuk perintah penjualan.]

Notes

For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4131–4234.

Cases referred to

Cooperative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283 (dist)
Credit Corporation (M) Bhd v Lucky Height Development Sdn Bhd & Ors [1996] 4 MLJ 556 (dist)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (dist)
Malaysia Building Society Bhd v Univein Sdn Bhd [2003] 4 MLJ 618 (folld)

Legislation referred to

National Land Code ss 254, 256(3)

Sharifah Shewikar Alhabshi (Taye & Co) for the plaintiff.
Aisah bte Saleh (AB Ng & Associates) for the defendant.

Lau Bee Lan J:

[1] This is a foreclosure action by the plaintiff, RHB Bank Bhd against the defendant, the registered owner of property situated at Lot 7770 Title No 33226, Bandar Maharani Daerah Muar, State of Johore ('the property'). The defendant obtained a housing loan facility (exh GJH-3) for RM340,000 subject to a charge created over the property which was registered at the Pejabat Pendaftaran, Pendaftar Hakmilik Tanah & Galian Negeri Johor on 21 August 2001 vide No Perserahan: 52529/2001 ('exh GJH-4'). The defendant defaulted on the loan repayment upon which the plaintiff recalled the aforesaid housing loan facility vide its recall letter dated 10 May 2005 ('exh GJH-5'). The defendant failed to remedy the default. The plaintiff then proceeded to issue notice under Form 16D of the National Land Code ('exh GJH-6') against the defendant regarding its intention to undertake foreclosure proceeding should the defendant still fail to remedy the default within 14 days from the date of service of the said notice pursuant to s 254 of the National Land Code ('the NLC').

[2] The defendant opposed the plaintiff's application for an order for sale primarily on the ground of failure on the part of the plaintiff to notify the defendant of the variation of the Base Lending Rate ('the BLR') from 6.00% pa up to 6.5% pa and 'kadar faedah 10% setahun (3.5% setahun + BLR) dengan kiraan bulanan di mana (BLR pada masa kini adalah 6.5%)' referred to in the Affidavit Tambahan of Gan Jin Ho affirmed on 2 May 2006 ('encl 9'). It was submitted on the defendant's behalf that this constituted 'a triable issue'.

[3] In the recall (notice of demand) letter, exh GJH-5, it is stated, inter alia, the plaintiff has demanded the defendant to settle the sum of RM285,126.04 being the outstanding balance as at 8 May 2005 'together with interest accruing at the rate of 7.50% per annum (1.50% per annum above the Base Lending Rate which is currently at 6.00% per annum)'. It is further stated that failure to settle within the stipulated time the plaintiff 'shall increase the interest rate to 9.5% per annum (3.5% per annum above the Base Lending Rate').

[4] The salient contentions of the learned counsel for the plaintiff are:

(a) Notis dalam Borang 16D Kanun Tanah Negara 1965 ('KTN') bertarikh 14 Julai 2005 ('Borang 16D tersebut') yang telah diserahkan ke atas Defendan adalah sah, teratur dan boleh dikuatkuasakan di sisi undang-undang kerana ia menyatakan dengan jelas faedah dan KPA yang dltuntut pada tarikh Borang 16D tersebut dikeluarkan. Ini adalah kerana tiada perubahan pada faedah dalam tindakan ini. Faedah yang dituntut dalam Borang 16D dan Saman Pemula bertarikh 15 August 2005 ('saman pemula tersebut') kekal pada 3.50% setahun + KPA (Kadar Pinjaman Asas).

(b) Defendan telah berjanji ('contracted') untuk membayar plaintif faedah berdasarkan KPA pada kadar turun naiknya ('fluctuating rate'). Malah, defendan juga tidak pernah membuat aduan bahawa plaintif telah menaikkan faedah tanpa notis.

(c) Even if there is a variation in the interest rate (which is denied) 'plaintif tidak dimestikan memberi notis mengenai perubahan tersebut kepada defendan seperti yang dinyatakan di klausa 7.5 (proviso)'.

(d) The point submitted by the defendant that, granted even if there has been a variation of the rate of interest which requires the plaintiff to give notice of the change, a failure to do so does not constitute 'cause to the contrary' under s 256(3) of the NLC and the case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 was cited in support.

[5] Perusing the notice issued under Form 16D of the NLC dated 14 July 2005, I find that the contents thereof are in conformity with the requirements of s 254 of the NLC and the amount of interest rate charged as per the Originating Summons dated 15 August 2005 remained the same, ie, 3.50% pa + BLR of 6.00 pa.

[6] It is pertinent to refer to certain clauses in the Facility Agreement ('Exh GJH-3') signed between the defendant and plaintiff. They are:

A *Clause 7.4 Variation*

Notwithstanding the provisions relating to the amount or rate of interest, commission or charges in this AGREEMENT, the BANK reserve the right at any time and from time to time hereafter at its absolute discretion to vary the amount, rate, mode or method of calculation of interest or commission or charges in respect of any or all of the FACILITY.

B *Clause 7.5 Manner of Variation*

7.5.1 In respect of the BLR of interest by displaying at the premises of the BANK a general notice of change of the BLR of the BANK addressed to the public generally and such display shall be deemed sufficient notice to the BORROWER or by any other modes deemed fir and proper by the BANK; and…

C PROVIDED ALWAYS that the effective date of the change of the BLR margin and/or DEFAULT RATE shall be the date specified in the notice. Notwithstanding anything hereinbefore contained, any delay or failure on the part of the BANK to give notice in accordance with the provisions herein contained shall not absolve the BORROWER from his obligation to pay interest at the PRESCRIBED RATE and/or DEFAULT RATE determined by the BANK.

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[7] I agree with the submission of the learned counsel for the plaintiff that by virtue of the proviso, the contention of the learned counsel for the defendant that no notice of variation of the BLR was extended to the plaintiff is immaterial as a failure to give notice shall not absolve the defendant from his obligation to pay interest at the E prescribed rate or the default rate determined by the Bank and, in both circumstances, the definition of 'prescribed rate' and 'default rate' includes the BLR (see cl 1 of the Facility Agreement).

F **[8]** The case of *Malaysia Building Society Bhd v Univein Sdn Bhd* [2002] 4 MLJ 618 at p 524 (cited on behalf of the plaintiff) supports this point. In *Malaysia Building Society Bhd v Univein Sdn Bhd* one of the defendant's contentions was that the plaintiff's claim of interest was excessive and irrecoverable. Low Hop Bing J (now Court of Appeal Judge) held, inter alia, the view that:

G The defendant's contention that it has no record of receipt of the notices of variation is immaterial in view of cl 3.2(c) thereof which provides that any failure by the plaintiff to give notices of variation of interest shall not prejudice or have the effect of invalidating any such variation of interest.

H **[9]** His Lordship also alluded to *Cooperative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283, where his Lordship stated:

Lim Beng Choon J found the plaintiff's demand for penalty interest to be wrongful, as the plaintiff has failed to comply with cl 5 of the charge there which required a notice to be served on the defendant. In the case before me, the relevant notice of variation of interest has been served on the defendant in compliance with cl 3.2(c) of the charges.

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[10] His Lordship also gave an additional reason:

Further, the charge in Co-operative Central Bank Ltd (In Receivership) supra, did not contain any clause to the effect that the plaintiff's failure to give defendant notice shall not prejudice the plaintiff's right, which was expressed in cl 3.2(c) of the charges in the case before me.

[11] Clause 3.2(c) of the charges stated:

(c) The chargee shall give notice of the rate of interest, or the ruling rate, to the chargor but failure by the Chargee to give notice shall not prejudice or have the effect of invalidating any such variation.

(d) Notice by the chargee may take any form.

[12] Thus, the cases of *Cooperative Central Bank Ltd (In Receivership) and Credit Corporation (M) Bhd v Lucky Height Development Sdn Bhd & Ors* [1996] 4 MLJ 556 (both cases are cited on behalf of the defendant) can be distinguished because there is no such expressed provision to the same effect found in those cases like the proviso to cl 7.5in the case before me.

[13] As to what constitutes 'cause to the contrary' for the purposes of setting aside an order for sale, the expression found in s 256(3) of the NLC has been enunciated in *Low Lee Lian*. The Federal Court has propounded that the said expression is limited to only the three following categories:

(1) when a chargor is able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC.

(2) when a chargor is able to demonstrate that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; and

(3) when a chargor is able to demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

[14] In this regard, learned counsel for plaintiff has highlighted the correct passage at p 88 H–I of *Low Lee Lian* where the Federal Court by way of illustration referred to the usual grounds raised in opposition to foreclosure by the chargor:

An application under s 256 is opposed by the chargor on the ground that the chargee has acted in breach of contract, eg by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the sums paid by the borrower. A judge faced with such complaints will merely say that they do not, on a proper reading of s 256(3)and the authorities which have considered the section, constitute cause to the contrary. He will not, and ought not to, enter upon a discussion of the question whether any or all of these complaints have or are devoid of any merit. (Emphasis added)

[15] For the foregoing reasons, I find the defendant has not discharged its burden to show the existence of cause to the contrary under s 256(3) of the NLC as per the requisite legal test set forth in *Low Lee Lian*. Further, the contention of the defendant

A that the plaintiff has failed to give notice of the variation of the BLR is devoid of merit. Even if it could be argued that there has been a failure (which I find to be otherwise), at the most it may only form the basis of an action in personam against the plaintiff, which cannot defeat the rights ad rem which accrued to the plaintiff under the registered charge to an order for sale.

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[16] I therefore make an order for sale in terms of encl 2.

Order for sale granted.

C Reported by Brendan Navin Siva

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